

**Colorado Bar Association Trusts & Estates Section  
Uniform Trust Code Part 5 (Creditors' Rights) Subcommittee  
of the Statutory Revisions Committee**

**Minutes of May 1, 2019**

**Participants**

In person:	By phone:
• Connie Eyster, Chair	• John Buckley
• Steve Brainard	• Jean Stewart
• Darla Daniel	• Kim Willoughby
• Michael Kirtland	
• Georgine Kryda	
• Malea McKeown	
• Kevin Millard	
• Daniela Ronchetti	
• Erik Solem	
• Carl Stevens	

The meeting was held at CBA offices, 1290 Broadway, Suite 1700 in Denver.  
The meeting was called to order at 9:00 a.m. by the Chair and adjourned at 10:25 a.m.  
Minutes of 4/3/19 were approved.

**Section 502 – Kevin and Carl**

The committee approved the suggested language for C.R.S. § 15-5-502 (attached to Connie's email of 4/30/2019 and reproduced below).

**15-5-502. Spendthrift Provision.**

- (1) A spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest.
- (2) A term of a trust providing that the interest of a beneficiary is held subject to a "spendthrift trust," or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest.
- (3) A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this [article], a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.
- (4) A TRUSTEE OF A TRUST THAT IS SUBJECT TO A SPENDTHRIFT PROVISION MAY MAKE A DISTRIBUTION THAT IS REQUIRED OR AUTHORIZED BY THE TERMS OF THE TRUST BY APPLYING THE DISTRIBUTION FOR THE BENEFICIARY'S BENEFIT. A CREDITOR OR ASSIGNEE OF THE BENEFICIARY MAY NOT REACH A DISTRIBUTION THAT IS APPLIED FOR THE BENEFICIARY'S BENEFIT, AND NO TRUSTEE IS LIABLE TO

ANY CREDITOR OF A BENEFICIARY FOR MAKING SUCH A DISTRIBUTION.

- (5) REAL PROPERTY OR TANGIBLE PERSONAL PROPERTY THAT IS OWNED BY THE TRUST BUT THAT IS MADE AVAILABLE FOR A BENEFICIARY'S USE OR OCCUPANCY IN ACCORDANCE WITH THE TRUSTEE'S AUTHORITY UNDER THE TERMS OF THE TRUST IS NOT CONSIDERED TO HAVE BEEN DISTRIBUTED BY THE TRUSTEE OR RECEIVED BY THE BENEFICIARY FOR PURPOSES OF ALLOWING A CREDITOR OR ASSIGNEE OF THE BENEFICIARY TO REACH THE PROPERTY.

**Conforming Amendment to C.R.S. § 15-5-816**

The committee approved the suggested language for C.R.S. § 15-5-816 (attached to Connie's email of 4/30/2019 and reproduced below).

15-5-816. Specific powers of trustee

- (1) Without limiting the authority conferred by section 15-5-815, and in addition to the powers conferred pursuant to the "Colorado Fiduciaries' Powers Act", part 8 of article 1 of this title 15, a trustee may:

...

- (u) Pay an amount distributable to a beneficiary BY PAYING IT DIRECTLY TO THE BENEFICIARY OR BY APPLYING IT FOR THE BENEFICIARY'S BENEFIT AND, IN THE CASE OF A BENEFICIARY who is under a legal disability or who the trustee reasonably believes is incapacitated, by paying it directly to the beneficiary or applying it for the beneficiary's benefit or by:

- (I) Paying it to the beneficiary's conservator or, if the beneficiary does not have a conservator, the beneficiary's guardian;
- (II) Paying it to the beneficiary's custodian pursuant to the "Colorado Uniform Transfers to Minors Act", article 50 of title 11, or custodial trustee pursuant to the "Colorado Uniform Custodial Trust Act", article 1.5 of this title 15, and for that purpose, creating a custodianship of [sic] custodial trust;
- (III) If the trustee does not know of a conservator, guardian, custodian, or custodial trustee, paying it to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf; or
- (IV) Managing it as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution;

....

## Section 503 – Connie

- Connie reviewed her redlined version of 503 included in her email of 4/30/2019.
  - Proposed 503(a) states: “(a) IN THIS SECTION, "CHILD" INCLUDES ANY PERSON WHO IS AN OBLIGEE PURSUANT TO A CURRENT CHILD SUPPORT ORDER, OR WHO IS THE HOLDER OF A JUDGMENT FOR CHILD SUPPORT IN THIS OR ANOTHER STATE
  - The “‘child’ includes” language sounded awkward to some committee members.
  - Kevin pointed out that some states use the language to include step-children.
- Mike Holder’s email regarding 503(c) (also attached to Connie’s email of 4/30/2019), was discussed.
  - Mike’s concern was interpreted as the court needing to remember that limits exist with respect to garnishment pursuant to C.R.S. § 15-54-104.
  - Steve: Because gifts are considered in the calculation of income, isn’t a trust distribution equivalent to a gift? Thus, shouldn’t we subject trust distributions to the same limits?
  - Connie: If we keep 503(c) and say “an order for execution attaching,” would this be sufficient to direct the court to the applicability of C.R.S. § 15-54-104?
  - Kim noted that C.R.S. § 15-54-104 puts limits on disposable earnings or wage assignments, but she could see trust distributions possibly characterized as gifts.
  - **Suggested language for 503(c):** “Nothing herein shall act to waive the limits set forth on child support garnishments.”
    - Kim: Are there any limits? If have earnings (which are defined in statute), one cannot have everything taken away.
    - Discussion ensued regarding a court and parties being unlikely to think of trust distributions as income and principal as a T&E attorney would. Kim confirmed that the question arises of whether a trust distribution in its entirety should be considered as trust income.
  - **Suggested language for 503(c):** “Trust can limit the award as appropriate.”
    - Connie: Is this a policy choice we should be making?
    - Discussion regarding whether the committee was making the issue more complex than necessary. Perhaps this is an area where courts need to make some decisions. For example, there is a difference between a \$500 distribution being used to pay a premium for health insurance or to pay for a luxury item. But it is too difficult to codify the distinction in statute.
    - The committee expressed support for the Family Law Section to consider drafting its own conforming amendment. Kim had no objection.
  - Jean asked about the mechanism for attaching a trust distribution. The consensus was that a creditor would present a court order to a trustee.

- Discussion regarding mandatory distributions (Section 503) and discretionary distributions (Section 504).
  - Should we explicitly limit 503 to “mandatory” distributions?
  - Carl noted the common confusion between discretionary and spendthrift distributions and suggested adding “not discretionary” to 503(c).
  - Discussion regarding the newly approved language added to Section 502(4) that a distribution “for the benefit of” is not available to creditors.
  - Erik: When does 503 arise with respect to discretionary distributions?
    - Connie: 503 says when a distribution (whatever kind) is made, a creditor can get a piece of that distribution.
    - Some committee members suggest limiting Section 503 to mandatory distributions.
    - Steve: Mike’s suggested language follows UTC language versus the 2005 committee’s suggested changes. That language defers to other provisions of state law. If there is no spendthrift provision, then one needs to look to Section 504.
- Connie: We want a policy decision to allow creditor access to distributions to the extent distributions are made, so why are we limiting the language in Section 503 to mandatory distributions?
  - Discussion regarding leaving Section 503 with added language of “an order for execution attaching” and be done.
- Read Sections 503 and 504 together. Section 503 applies when trustee has made a choice to distribute and there is a spendthrift clause. Section 504 has a higher standard, and is thus tougher for creditors.
  - Carl: Unless there is an abuse of discretion by a trustee (which includes a trustee acting in bad faith), a court cannot substitute its discretion for that of the trustee.
  - The committee expressed some consensus on 503(c), specifically, if a distribution is made, a creditor can seek a portion of that distribution.
  - Eric believes that Section 504 trumps 503 in some way.
  - Connie will look at what other states have done with Section 503(c).
- Darla: Will 503(c) override 502(4)? Consensus: Yes.
- John B.: Is there potential for an ex-spouse to intervene? This issue was tabled.

### **Summer Meetings**

The committee agreed to meet on Wednesdays, June 12 and on July 10 at the CBA offices from 9:00 -10:30 a.m. on each day.

**For June 12, 2019:**

- Connie to look at how other states have handled Section 503(c);
- Continue discussion of Sections 503 and 504, and possibly vote on one or both sections;  
and
- Start Section 505.

**The next meeting** will be on Wednesday, June 12, 2019 at 9 a.m. at the CBA offices, 1290 Broadway, Suite 1700 in Denver.

<p><b>1. Part 5 UTC SECTION</b></p>	<p><b>504</b></p>
<p><b>2. SUBJECT</b></p>	<p><b>Discretionary Trusts; Effect of Standard</b></p>
<p><b>3. Part 5 UTC STATUTE</b></p>	<p>(a) In this section, “child” includes any person for whom an order or judgment for child support has been entered in this or another State.</p> <p>(b) Except as otherwise provided in subsection (c), whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee’s discretion, even if:</p> <p style="padding-left: 40px;">(1) the discretion is expressed in the form of a standard of distribution; or</p> <p style="padding-left: 40px;">(2) the trustee has abused the discretion.</p> <p>(c) To the extent a trustee has not complied with a standard of distribution or has abused a discretion:</p> <p style="padding-left: 40px;">(1) a distribution may be ordered by the court to satisfy a judgment or court order against the beneficiary for support or maintenance of the beneficiary’s child, spouse, or former spouse; and</p> <p style="padding-left: 40px;">(2) the court shall direct the trustee to pay to the child, spouse, or former spouse such amount as is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion.</p> <p>(d) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.</p> <p>(e) If the trustee’s or cotrustee’s discretion to make distributions for the trustee’s or cotrustee’s own benefit is limited by an ascertainable standard, a creditor may not reach or compel distribution of the beneficial interest except to the extent the interest would be subject to the creditor’s claim were the beneficiary not acting as trustee or cotrustee.</p>
<p><b>4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS</b></p>	<p>This section addresses the ability of a beneficiary’s creditor to reach the beneficiary’s discretionary trust interest, whether or not the exercise of the trustee’s discretion is subject to a standard. This section, similar to the Restatement, eliminates the distinction between discretionary and support trusts, unifying the rules for all trusts fitting within either of the former categories. <i>See</i> Restatement</p>

(Third) of Trusts Section 60 Reporter's Notes to cmt. a (Tentative Draft No. 2, approved 1999). By eliminating this distinction, the rights of a creditor are the same whether the distribution standard is discretionary, subject to a standard, or both. Other than for a claim by a child, spouse or former spouse, a beneficiary's creditor may not reach the beneficiary's interest. Eliminating this distinction affects only the rights of creditors. The effect of this change is limited to the rights of creditors. It does not affect the rights of a beneficiary to compel a distribution. Whether the trustee has a duty in a given situation to make a distribution depends on factors such as the breadth of the discretion granted and whether the terms of the trust include a support or other standard. See Section 814 comment.

For a discussion of the definition of "child" in subsection (a), see Section 503 Comment.

Subsection (b), which establishes the general rule, forbids a creditor from compelling a distribution from the trust, even if the trustee has failed to comply with the standard of distribution or has abused a discretion. Under subsection (d), the power to force a distribution due to an abuse of discretion or failure to comply with a standard belongs solely to the beneficiary. Under Section 814(a), a trustee must always exercise a discretionary power in good faith and with regard to the purposes of the trust and the interests of the beneficiaries.

Subsection (c) creates an exception for support claims of a child, spouse, or former spouse who has a judgment or order against a beneficiary for support or maintenance. While a creditor of a beneficiary generally may not assert that a trustee has abused a discretion or failed to comply with a standard of distribution, such a claim may be asserted by the beneficiary's child, spouse, or former spouse enforcing a judgment or court order against the beneficiary for unpaid support or maintenance. The court must direct the trustee to pay the child, spouse or former spouse such amount as is equitable under the circumstances but not in excess of the amount the trustee was otherwise required to distribute to or for the benefit of the beneficiary. Before fixing this amount, the court having jurisdiction over the trust should consider that in setting the respective support award, the family court has already considered the respective needs and assets of the family. The Uniform Trust Code does not prescribe a particular procedural method for enforcing a judgment or order against the trust, leaving that matter to local collection law.

Subsection (e), which was added by a 2004 amendment, is discussed below.

**2004 Amendment.**

**Section 504(e), 103(11)**

Trusts are frequently drafted in which a trustee is also a beneficiary. A common example is what is often referred to as a bypass trust, under which the settlor's spouse will frequently be named as both trustee and beneficiary. An amount equal to the exemption from federal estate tax will be placed in the bypass trust, and the trustee, who will often be the settlor's spouse, will be given discretion to make distributions to the beneficiaries, a class which will usually include the spouse/trustee. To prevent the inclusion of the trust in the spouse-trustee's gross estate, the spouse's discretion to make distributions for the spouse's own benefit will be limited by an ascertainable standard relating to health, education, maintenance, or support.

The UTC, as previously drafted, did not specifically address the issue of whether a creditor of a beneficiary may reach the beneficial interest of a beneficiary who is also a trustee. However, Restatement (Third) of Trusts §60, comment g, which was approved by the American law Institute in 1999, provides that the beneficial interest of a beneficiary/trustee may be reached by the beneficiary/trustee's creditors. Because the UTC is supplemented by the common law (see UTC Section 106), this Restatement rule might also apply in states enacting the UTC. The drafting committee has concluded that adoption of the Restatement rule would unduly disrupt standard estate planning and should be limited. Consequently, Section 504 is amended to provide that the provisions of this section, which generally prohibit a creditor of a beneficiary from reaching a beneficiary's discretionary interest, apply even if the beneficiary is also a trustee or cotrustee. The beneficiary-trustee is protected from creditor claims to the extent the beneficiary-trustee's discretion is protected by an ascertainable standard as defined in the relevant Internal Revenue Code sections. The result is that the beneficiary's trustee's interest is protected to the extent it is also exempt from federal estate tax. The amendment thereby achieves its main purpose, which is to protect the trustee-beneficiary of a bypass trust from creditor claims.

The protection conferred by this subsection, however, is no greater than if the beneficiary had not been named trustee. If an exception creditor can reach the beneficiary's interest under some other provision, the interest is not insulated from creditor claims by the fact the beneficiary is or becomes a trustee. In addition, the definition of "power of withdrawal" in Section 103 is amended to clarify that a power of withdrawal does not include a power exercisable by the trustee that is limited by an ascertainable standard. The purpose of this amendment is to preclude a claim that the power of a trustee-

	<p>beneficiary to make discretionary distributions for the trustee-beneficiary's own benefit results in an enforceable claim of the trustee-beneficiary's creditors to reach the trustee-beneficiary's interest as provided in Section 505(b). Similar to the amendment to Section 504, the amendment to "power of withdrawal" is being made because of concerns that Restatement (Third) of Trusts Section 60, comment g, otherwise might allow a beneficiary-trustee's creditors to reach the trustee's beneficial interest.</p> <p>The Code does not specifically address the extent to which a creditor of a trustee/beneficiary may reach a beneficial interest of a beneficiary/trustee that is not limited by an ascertainable standard. For the definition of "ascertainable standard," see Section 103(2).</p>
<p><b>5. 2005 COLORADO COMMITTEE COMMENTS</b></p>	<p>While trusts with valid spendthrift provisions directly prevent beneficiaries from assigning their interests and creditors of such beneficiaries from attaching their interests (with certain exceptions as we have seen), the very nature of beneficial interests in discretionary trusts and trusts subject to a standard indirectly bar the reach of creditors of a beneficiary. A creditor who has attached a discretionary interest (because of the absence of a spendthrift provision or because a spendthrift exception applies) cannot, as a general rule, force exercise of discretion. Thus, the indirect protection against creditor claims.</p> <p><i>Restatement (Second) of Trusts, sections 154 and 155 provide:</i></p> <p><i>§154. Trusts for Support</i></p> <p><i>Except as stated in §§156 and 157, if by the terms of a trust it is provided that the trustee shall pay or apply only so much of the income and principal or either as is necessary for the education or support of the beneficiary, the beneficiary cannot transfer his interest and his creditors cannot reach it.</i></p> <p><i>§155. Discretionary Trusts</i></p> <p><i>(1) Except as stated in § 156, if by the terms of a trust it is provided that the trustee shall pay to or apply for a beneficiary only so much of the income and principal or either as the trustee in his uncontrolled discretion shall see fit to pay or apply, a transferee or creditor of the beneficiary cannot compel the trustee to pay any part of the income or principal.</i></p> <p><i>(2) Unless a valid restraint on alienation has been imposed in accordance with the rules stated in §§ 152 and 153, if the trustee pays to or applies for the beneficiary any part of the income or principal with knowledge of the transfer or after he has been served with</i></p>

*process in a proceeding by a creditor to reach it, he is liable to such transferee or creditor.*

*Restatement (Third) of Trusts section 60 provides:*

*Transfer or Attachment of Discretionary Interests*

*Subject to the rules stated in sections 58 and 59 (on spendthrift trusts), if the terms of a trust provide for a beneficiary to receive distributions in the trustee 's discretion, a transferee or creditor of the beneficiary is entitled to receive or attach any distributions the trustee makes or is required to make in the exercise of that discretion after the trustee has knowledge of the transfer or attachment. The amounts a creditor can reach may be limited to provide for the beneficiary's needs (Comment c), or the amounts may be increased where the beneficiary is either the settlor (Comment f) or holds the discretionary power to determine his or her own distributions (Comment g).*

*Restatement (Third) of Trusts recognizes the common law right of a beneficiary's creditor to attach his or her discretionary interest unless a valid spendthrift provision applies to the interest. Restatement (Third) of Trusts section 60 cmt. a.*

*In a departure from the Restatement (Second) of Trusts, with respect to creditor rights, Restatement (Third) applies to discretionary interests whether expressed in the form of a standard or not. Restatement (Third) of Trusts section 60 cmt. a and Rptr's Notes on cmt. a.*

*Under Restatement (Third), self-settled discretionary interests are not protected against creditor claims whether or not there is a spendthrift provision. Restatement (Third) of Trusts section 60 cmt. f.*

*Under the Third Restatement where a discretionary beneficiary is also trustee, his or her creditors are able to reach the maximum amount that the trustee/beneficiary can properly take. Restatement (Third) of Trusts section 60 cmt. g.*

*As a general rule, a creditor of a beneficiary cannot compel the trustee to make discretionary distributions if the beneficiary cannot do so. However, the Restatement (Third) of Trusts points out that it is rare that a beneficiary is so powerless taking into account the beneficiary's circumstances, the terms of the discretionary power and the purposes of the trust. Thus, the exercise or non-exercise of discretion is always subject to judicial review to prevent abuse. Restatement (Third) of Trusts section 60 cmt. e.*

	<p>Compared with the <i>Restatement</i> position, the rule codified in the Uniform Trust Code is much more protective of discretionary interests with respect to creditor claims. The UTC makes it clear that, whether or not there is a spendthrift provision in the terms of the trust, no creditor of a beneficiary can compel a distribution that is subject to the trustee's discretion whether such discretion is expressed in the form of a standard or not, even if the trustee has abused discretion or failed to comply with the standard. Thus, under the UTC, even a creditor who has provided support to the beneficiary of a support trust is unable to force exercise of discretion.</p> <p>Section 504(c) of the Uniform Trust Code makes a public policy exception with respect to a discretionary beneficiary's child, spouse or former spouse who has a judgment for support. Such a creditor can force exercise of discretion but only if the trustee has abused discretion or failed to comply with the standard. However, this UTC provision only authorizes the court to force exercise of discretion in satisfaction of the judgment. It does not require it. If a court does act, the UTC requires the court to direct the trustee to distribute to the creditor only an amount that is equitable taking into account the discretionary beneficiary's circumstances.</p> <p><b>2005 Amendment.</b></p> <p><i>Restatement (Third) of Trusts</i> section 60, cmt. g. provides that the beneficial interest of a beneficiary/trustee may be reached by his or her creditors. This <i>Restatement</i> position would apply in the case of the surviving spouse serving as trustee and beneficiary of a family (exemption) trust. This 2005 NCCUSL amendment is intended to eliminate such a result and thereby protect estate plans employing a traditional family trust arrangement, provided the trustee's power to make discretionary distributions to self is limited by an ascertainable standard.</p>
<p><b>6. COLORADO LAW</b></p>	<p>Colorado courts have recognized the <i>Restatement (Second)</i> position with respect to discretionary trusts in the context of determining whether a discretionary interest is "property" for purposes of division of property in divorce. <u>Absent an abuse of discretion</u>, a beneficiary cannot compel exercise of discretion and therefore, the discretionary interest is not "property" for this purpose. See for example <i>In Re Marriage of Rosenblum</i>, 602 P.2d 892 (Colo. App. 1979); <i>In Re Marriage of Jones</i>, 812 P.2d 1152 (Colo. 1991); and <i>In Re McCart</i>, 847 P.2d 184 (Colo. App. 1992.)</p> <p>These Colorado decisions do not address whether and under what circumstances a beneficiary's creditor can force exercise of discretion. The <i>Restatement (Third)</i> position recognizes the common law right of a creditor to force an exercise of discretion. If the trustee has abused</p>

	<p>discretion it is possible, but not likely, that the beneficiary's creditor could obtain a court order forcing exercise of discretion. <i>Restatement (Third) of Trusts</i>, Section 60 cmt. e.</p> <p>UTC section 504 is more protective than the <i>Restatement</i> position. Under this section, no creditor is permitted to force a trustee's exercise of discretion, even if the trustee has abused discretion (e.g. acted dishonestly with an improper motive or failed to exercise judgment or act at all). However, a beneficiary's child, spouse or former spouse, who has a judgment against the beneficiary for support or maintenance, may obtain a court ordered distribution from the trust if the child, spouse or former spouse can demonstrate that the trustee has abused discretion. Any such court ordered distribution must be equitable taking into account the beneficiary's interest. Moreover, such court ordered distribution cannot exceed the amount that the trustee would have distributed if the trustee had not abused discretion.</p>
<p><b>7. OTHER STATES</b></p>	<p>Alabama – adopted 504 verbatim</p> <p>Arizona – excepts child only (does not apply exceptions to special needs trusts)</p> <p>Arkansas – omitted 504(c)</p> <p>District of Columbia – reserved</p> <p>Florida – creditors, including exception creditors under 504(2) (child, spouse, former spouse), may not compel a distribution or attach or otherwise reach the interest a beneficiary might have as a result of the trustee's discretion to make distributions to or for the benefit of the beneficiary</p> <p>Kansas – omitted 504</p> <p>Kentucky – excepts child and spouse</p> <p>Maine – omitted 504(c)</p> <p>Maryland – excepts (a) trust property subject to withdrawal power, and (b) contributions to trust by beneficiary</p> <p>Mass. – reserved 504</p> <p>Michigan – (.7505) no exceptions to discretionary trust provision; trust property not subject to enforcement of a judgment until income or principal is distributed directly to trust beneficiary.</p> <p>Minn. – no exception creditors</p>

	<p>Mississippi – reserved all of Part 5</p> <p>Missouri – creditor cannot attach, force judicial sale, or compel distributions or reach by any other means present or future discretionary distributions</p> <p>Montana – no exception creditors</p> <p>Nebraska – adopted 504 verbatim</p> <p>New Hampshire – court may compel discretionary distribution to child, spouse, or former spouse in such amount as is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused discretion; and, with respect to alimony, only for and to the extent that the judgment or court order expressly specifies the alimony amount attributable to the most basic food, shelter and medical needs of the former spouse.</p> <p>New Mexico – enacted 504 verbatim</p> <p>North Carolina – excepts child only</p> <p>North Dakota – adopted 504 verbatim</p> <p>Ohio – 508.04(D) unless the settlor has explicitly provided in the trust that the beneficiary’s child or spouse or both are excluded from benefiting from the trust, if there is a failure to apply standard or an abuse of discretion, then the court may order a distribution only if it is available for the beneficiary’s support – but not for the satisfaction of a judgment for the support of a former spouse.</p> <p>Oregon – omitted 504</p> <p>Pennsylvania – adopted 504 verbatim</p> <p>South Carolina – exception only for children (but does not apply to special needs trusts)</p> <p>Tennessee – no exception creditors</p> <p>Utah – adopted 504 verbatim</p> <p>Vermont – adopted 504 verbatim</p> <p>Virginia – exceptions only for children</p>
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	<p>West Virginia - exceptions only for children</p> <p>Wisconsin – substantial reworking of text: no exception creditors; specifically provides that interest in discretionary trust is not “property”; general principles do not apply if beneficiary can make purely discretionary distributions to self or without consent of adverse party</p> <p>Wyoming – no exception creditors; and may not compel a distribution or reach or attach the interest of a beneficiary until a distribution is received by the beneficiary, even if the trustee makes distributions directly to third parties for the benefit of the beneficiary.</p>
<b>8. RECOMMENDATION</b>	

**15-5-503. Exceptions to spendthrift provision.**

(a) IN THIS SECTION, "CHILD" INCLUDES ANY PERSON ~~FOR WHOM AN ORDER OR JUDGMENT FOR CHILD SUPPORT HAS BEEN ENTERED WHO IS AN OBLIGEE PURSUANT TO A CURRENT CHILD SUPPORT ORDER, OR WHO IS THE HOLDER OF A JUDGMENT FOR CHILD SUPPORT~~ IN THIS OR ANOTHER STATE

(b) ~~TO THE EXTENT PROVIDED IN SUBSECTION (c) OF THIS SECTION,~~ A SPENDTHRIFT PROVISION IS UNENFORCEABLE AGAINST:

~~(1) A BENEFICIARY'S CHILD WHO IS AN OBLIGEE PURSUANT TO A CURRENT CHILD SUPPORT ORDER FOR WHICH THE BENEFICIARY IS THE OBLIGEE, OR WHO HOLDS A JUDGMENT FOR CHILD SUPPORT, SPOUSE, OR FORMER SPOUSE WHO HAS A JUDGMENT OR COURT ORDER AGAINST THE BENEFICIARY FOR SUPPORT OR MAINTENANCE;~~

(2) A JUDGMENT CREDITOR WHO HAS PROVIDED ESSENTIAL SERVICES FOR THE PROTECTION OF A BENEFICIARY'S INTEREST IN THE TRUST; AND

~~(3) A CLAIM OF THIS STATE OR THE UNITED STATES TO THE EXTENT A STATUTE OF THIS STATE OR FEDERAL LAW SO PROVIDES.~~

(c) THE ONLY REMEDY OF A CLAIMANT AGAINST WHOM A SPENDTHRIFT PROVISION CANNOT BE ENFORCED IS TO OBTAIN FROM A COURT AN ORDER ATTACHING PRESENT OR FUTURE DISTRIBUTIONS TO OR FOR THE BENEFIT OF THE BENEFICIARY. THE COURT MAY LIMIT THE AWARD TO SUCH RELIEF AS IS APPROPRIATE UNDER THE CIRCUMSTANCES.

(D) THE EXCEPTION IN SUBSECTION (B) IS UNENFORCEABLE AGAINST A SPECIAL NEEDS TRUST, SUPPLEMENTAL NEEDS TRUST, OR SIMILAR TRUST ESTABLISHED FOR A DISABLED PERSON IF THE APPLICABILITY OF SUCH A PROVISION COULD INVALIDATE SUCH A TRUST'S EXEMPTION FROM CONSIDERATION AS A COUNTABLE RESOURCE FOR MEDICAID OR SUPPLEMENTAL SECURITY INCOME (SSI) PURPOSES OR IF THE APPLICABILITY OF SUCH A PROVISION HAS THE EFFECT OR POTENTIAL EFFECT OF RENDERING SUCH DISABLED PERSON INELIGIBLE FOR ANY PROGRAM OF PUBLIC BENEFIT, INCLUDING, BUT NOT LIMITED TO, MEDICAID AND SSI.

**Commented [CTE1]:** Mike Holder has suggested the following:

The following is my most abbreviated suggestion for alterations to UTC sections 503(c) and 504(c). Upon reflection, if these sections indicate that the court will or may order "execution" upon distributions, the court and litigants are put on fairly clear notice that the rules of execution apply. The limits upon execution and levy (garnishment being in aid of execution) are found in CRS Section 13-54-104(3)(b), and in CRS Section 13-54-104((1)(b)(II)(C)), it is provided that "monetary gifts" are included as income for child support execution.

"503(c) A claimant against which a spendthrift provision cannot be enforced may obtain from a court an order for execution upon present or future distributions to or for the benefit of the beneficiary. The court may limit the award to such relief as is appropriate under the circumstances."

**Commented [CTE2]:** This language is not uniform. It comes from the South Carolina Statute Section 62-7-503. Arizona and North Dakota statutes also expressly protect special needs trusts from these exception creditors. I have included it for our consideration. The relevant SC, AZ and ND statutes are also attached hereto.

### Considerations re: discussion UTC 503

At our last meeting we had an extended discussion regarding whether trusts which do not contain a spendthrift clause, should be subject to the provisions of 503, allowing certain exception creditors to attach distributions to a beneficiary from a spendthrift trust.

It is helpful to remember that Section 501, provides generally that trusts without spendthrift clauses are subject to a beneficiary's creditors:

UTC language:

"To the extent a beneficiary's interest is not subject to a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means. The court may limit the award to such relief as is appropriate under the circumstances."

However, we modified Section 501 in the following relevant way:

*"Except as provided in Section 504, to the extent a beneficiary's interest is not subject to a spendthrift provision or is a discretionary trust interest as provided in Section 504, the court may authorize a creditor or assignee of the beneficiary to attach present or future distributions to or for the benefit of the beneficiary. The court may limit the award to such relief as is appropriate under the circumstances."*

Section 504 addresses the following relevant issues:

- (1) Whether or not a trust contains a spendthrift provision, a creditor of a beneficiary cannot compel a distribution that is subject to the trustee's discretion, even if the trustee's discretion is expressed in the form of a standard, and even if the trustee has abused its discretion.
- (2) If the trustee has not complied with a standard of distribution or has abused its discretion, then the court may order a distribution to satisfy a judgment by an exception creditor (note that we have not addressed this section as a group yet)

Concerns:

- (1) The additional language in Section 501 "or is a discretionary trust interest as provided in Section 504" was added with the intent of allowing certain discretionary trusts which do not contain a spendthrift clause to be treated under 501 with respect to creditors as if there were a spendthrift provision.
- (2) However, Section 503 applies only to trusts with a spendthrift clause. If we are going to treat discretionary trusts as if there were a spendthrift clause for Section 501, then I suggest we subject those trusts to the same exception creditor provisions as trusts with a spendthrift clause under 503.
- (3) I am also concerned that a "discretionary trust interest" is not a defined term in 504.

We can address these matters at the next CUTC meeting.

Thanks, Connie